

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   NATIONAL PARK HOSPITALITY                   :

4   ASSOCIATION,                               :

5                   Petitioner                   :

6                   v.                               :   No. 02-196

7   DEPARTMENT OF THE INTERIOR,               :

8   ET AL.                                       :

9   - - - - -X

10   Washington, D.C.

11   Tuesday, March 4, 2003

12                   The above-entitled matter came on for oral

13   argument before the Supreme Court of the United States at

14   10:22 a.m.

15   APPEARANCES:

16   KENNETH S. GELLER, ESQ., Washington, D.C.; on behalf of

17   the Petitioner.

18   JOHN P. ELWOOD, ESQ., Assistant to the Solicitor General,

19   Department of Justice, Washington, D.C.; on behalf

20   of the Respondent.

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1 P R O C E E D I N G S

2 (10:22 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 02-196, the National Park Hospitality  
5 Association versus the Department of the Interior.

6 Mr. Geller.

7 ORAL ARGUMENT OF KENNETH S. GELLER

8 ON BEHALF OF THE PETITIONER

9 MR. GELLER: Thank you, Mr. Chief Justice, and  
10 may it please the Court:

11 This case concerns the applicability of the  
12 Contract Disputes Act to contracts between National Park  
13 Service and the private concessioners who contract to  
14 provide visitor services and to operate and maintain  
15 facilities in more than 100 of our national parks.

16 QUESTION: Mr. Geller, I have a couple of  
17 preliminary questions.

18 First of all, this is a facial challenge made by  
19 the National Park Hospitality Association, I take it. How  
20 is the claim ripe for adjudication? Has the association  
21 been injured actually? There's no case pending.

22 MR. GELLER: Your Honor, to begin with, let me  
23 say that as to this facial challenge point, this -- this  
24 was an argument that was never made below. It was not  
25 made in the district court. It was not made in the court

1 of appeals. It was not made in the opposition to  
2 certiorari.

3 QUESTION: Is it one that we're precluded from  
4 concerning ourselves with?

5 MR. GELLER: Well, I'm not sure it's a  
6 jurisdictional issue.

7 QUESTION: Right.

8 MR. GELLER: So it -- it may well be waived.

9 But let me also say quickly that I think this  
10 whole --

11 QUESTION: Mr. Geller, I think that -- I think  
12 the ripeness issue --

13 MR. GELLER: Yes, I was going to address  
14 ripeness.

15 QUESTION: -- subsists whether or not it's a  
16 facial challenge.

17 MR. GELLER: Right. I was going to address  
18 ripeness separately, Justice Scalia. In terms of this  
19 facial/as-applied, this is an APA challenge to a  
20 regulation. I'm not aware that the Court has really used  
21 this facial/as-applied nomenclature --

22 QUESTION: Okay.

23 MR. GELLER: -- in that -- in that context.  
24 After all, under the APA, the question is whether a --  
25 an -- a regulation is arbitrary or capricious or contrary

1 to law. Here we have a regulation that categorically  
2 states no NPS -- no National Park Service concession  
3 contracts are subject to the CDA. If there -- there are,  
4 in fact, some such contracts that are subject to the CDA,  
5 as we believe there are, then that regulation is arbitrary  
6 and capricious. The agency should have to go back and  
7 draft a more refined regulation.

8 QUESTION: Is that -- is that the standard for  
9 ripeness --

10 MR. GELLER: I --

11 QUESTION: -- whether the regulation is arbitrary  
12 or --

13 MR. GELLER: No, no, no. I --

14 QUESTION: Why is this any different -- you  
15 contend that the agency has no authority to speak  
16 authoritatively on this -- on this issue anyway. And  
17 therefore, this regulation, as I understand your -- your  
18 position, is -- is of no more effect than the agency's  
19 announcement of what its litigating position will be.

20 MR. GELLER: Not quite, Justice Scalia.

21 QUESTION: All right.

22 MR. GELLER: I'm trying to -- I'm trying to  
23 distinguish the facial/as-applied point that Justice  
24 O'Connor raised from the ripeness question, which I'll get  
25 to in just a minute.

1           This is not a -- a -- there was an as-applied  
2 challenge, to begin with, made in the district court.  
3 This is not a facial challenge in the sense that we're  
4 asking the Court to strike down the regulation based on  
5 hypotheticals or on factual situations that may never  
6 arise. We know what these concessions contracts look  
7 like. The NPS has issued standard concessions contracts.  
8 It seems to us rather easy to determine whether the  
9 services that are called for in those contracts bring the  
10 contracts within the -- within the CDA. So I don't think  
11 there's anything to this facial challenge.

12           QUESTION: Well, presumably there are many  
13 different kinds of concession contracts. Some might be  
14 covered; some might not.

15           MR. GELLER: Well, I don't think so, Justice  
16 O'Connor, because there are standard concessions  
17 contracts. They're in the record and it's clear that they  
18 call for certain types of services. And we think it's  
19 clear that the Court, as the two lower courts did, can  
20 determine whether those contracts call for the procurement  
21 of services that would bring them within the CDA or call  
22 for the repair or maintenance of real property.

23           Now --

24           QUESTION: How many -- what are there? 10  
25 standard concession contracts?

1 MR. GELLER: Three. There are, I think, three.

2 QUESTION: Three?

3 MR. GELLER: And they all call for the same  
4 types of services at national parks. There are -- there  
5 are copies in the -- in the record.

6 Now, in terms of your ripeness argument, Justice  
7 Scalia, once again, the -- the Government never made any  
8 suggestion that this case was not ripe below. The reason  
9 it's not unripe is that the standard concession contracts  
10 and the contracts that, in fact, the NPS is putting out  
11 for bid incorporate within them the statement that these  
12 contracts are not subject to the CDA. The NPHA and its  
13 members need to know now, in terms of deciding whether to  
14 bid on certain contracts, what their rights are under  
15 those contracts, and therefore --

16 QUESTION: But how -- how does it hurt you to --  
17 in the present posture, as I understand it, the  
18 contracts -- whatever it's called -- the ICBA decides  
19 these cases in your favor. So in the -- in the setting of  
20 a concrete dispute, the contracting officer rules against  
21 one of the concessionaires. The concessionaires goes to  
22 that board if they want to and the board will rule, at  
23 least on the jurisdictional point, that -- that the  
24 Contracts Dispute Act does apply. So how are you hurting  
25 by --

1                   MR. GELLER: We are harmed, Justice Ginsburg,  
2     because it is important for the concessioners to know, at  
3     the time that they're deciding whether to bid on a  
4     contract and -- and the time they're deciding how much to  
5     bid on a contract, what their rights are under that  
6     contract. It's a pre-bid -- it's a solicitation in which  
7     the --

8                   QUESTION: That would be the same case if the  
9     agency simply announced, our litigating position in these  
10    contracts is going to be that they are not covered by the  
11    Contract Disputes Act.

12                  MR. GELLER: Yes, but the --

13                  QUESTION: You'd be in exactly the same  
14    position.

15                  MR. GELLER: And we would be --

16                  QUESTION: Would -- would you have the ability  
17    to sue?

18                  MR. GELLER: We would be -- because it is a  
19    provision of these contracts, Your Honor, that  
20    incorporates the regulation that states that they are not  
21    subject to the CDA. So this is a proper challenge to the  
22    solicitation as including an illegal term. The contracts,  
23    on their face by incorporating this regulation, say you  
24    have no rights under the CDA. It seems to us -- and we  
25    think the law is clear, although the Government never made

1 this challenge, so it's not been briefed -- that the  
2 concessioners have a right to know at the outset, in  
3 deciding whether or not to bid, whether the Government is  
4 right in asserting that they have no rights under the CDA  
5 if they enter into these --

6 QUESTION: Well, if it's an invalid provision,  
7 could the contracting party simply contract and then go  
8 into court later on and say, well, this clause is  
9 unenforceable?

10 MR. GELLER: Well, I don't know, Justice  
11 Kennedy. You would be signing a contract that agrees to  
12 the provision in the contract that says that you have no  
13 rights enforceable under the CDA.

14 But beyond that, the Government has taken the  
15 position you have no rights enforceable under the CDA. So  
16 it's not clear how you would follow through on your rights  
17 under that --

18 QUESTION: Well --

19 QUESTION: If you're -- if you're right,  
20 Mr. Geller, I suppose your client could go into court and  
21 ask for a declaratory judgment, even though there's  
22 nothing in the contract saying, we want to find out which  
23 provision of -- as to review applies to us.

24 MR. GELLER: But this is a pre-enforcement  
25 challenge to a regulation --

1 QUESTION: But that's -- that's the problem.

2 MR. GELLER: But --

3 QUESTION: In the case that I put, I don't think

4 you could get declaratory relief until you've alleged that

5 there was going to be a dispute. You can say, yes, I --

6 MR. GELLER: But there is a --

7 QUESTION: -- I might have an argument down the

8 line and I want to know where I want to go. That seems to

9 me --

10 MR. GELLER: But -- but, Justice Kennedy, the --

11 QUESTION: -- speculative. I just don't see the

12 harm to your client in waiting.

13 MR. GELLER: The harm, Your Honor, is in not

14 knowing, at the time you're being asked to bid on

15 contracts, what your rights are under those contracts.

16 QUESTION: So it's --

17 MR. GELLER: It's like any other provision.

18 QUESTION: Is it established -- I mean, my -- my

19 guess is it is, but -- but if the Government, the Defense

20 Department, any other Department, presents a -- a private

21 individual with a contract with 14 conditions and one of

22 those conditions, in the view of the private person, is

23 unlawful, not authorized by statute, contrary to statute,

24 that that person, before bidding on the contract, can go

25 to court and say, I would like this set aside as unlawful.

1 MR. GELLER: I think that there is a --

2 QUESTION: Is there authority on that?

3 MR. GELLER: I think that there's --

4 QUESTION: If there is authority on that, I

5 guess that's the end of it. You're right.

6 MR. GELLER: Yes, I think there is authority

7 under -- under the -- under the Tucker Act, which is one

8 of the provisions of -- that we cited in the complaint,

9 that allows you to bring challenges to bid solicitations

10 on the ground that they --

11 QUESTION: And these regulations are

12 incorporated into the contract.

13 MR. GELLER: And these -- these are --

14 absolutely regulations are incorporated into the contract.

15 QUESTION: What is the authority, Mr. Geller?

16 You said there is --

17 MR. GELLER: I think it's section 1491. I mean,

18 it -- it is one of the provisions that we relied on in

19 the -- in the complaint in this case to bring this

20 challenge.

21 And I might say to the Court --

22 QUESTION: Is there -- is there any case that

23 supports this particular --

24 MR. GELLER: Yes, there are, but -- but I was

25 about to say, Mr. Chief Justice, that this -- that the

1 Government has never challenged ripeness, and that's not  
2 suggest -- it is not to suggest that it's not something  
3 that this Court can consider, but I think it's unfair to  
4 decide that issue on the -- when it hasn't been fully  
5 briefed by the parties. It's never been challenged at any  
6 time in this case.

7 QUESTION: Unless it force -- unless the failure  
8 to consider it forces us to decide a case on -- on facts  
9 that we find, you know, rather amorphous.

10 MR. GELLER: But they're not amorphous, Justice  
11 Scalia --

12 QUESTION: That's the purpose of the ripeness  
13 doctrine --

14 MR. GELLER: -- because --

15 QUESTION: -- to make it easier for us to decide  
16 the case.

17 MR. GELLER: I'm not suggesting the Court  
18 doesn't have the authority to do it. I'm suggesting the  
19 issue has not been briefed, that we did present the Tucker  
20 Act as the basis for jurisdiction in the Court --

21 QUESTION: Then is the issue before us --

22 MR. GELLER: Excuse me?

23 QUESTION: Is the issue before us whether the  
24 three contracts that are in the record are procurement  
25 contracts within the meaning of the statute?

1 MR. GELLER: Yes.

2 QUESTION: And that's ripe because --

3 MR. GELLER: Yes.

4 QUESTION: -- you have members of your

5 association who are considering bidding on contracts

6 that contain -- that those three contracts, which are

7 universal -- and they don't want to do it if -- or may or

8 may not want to if that -- that term is lawful. But they

9 might do it if it's --

10 MR. GELLER: That's precisely -- that's

11 precisely right.

12 QUESTION: And may I ask one other -- other

13 question? The -- court of appeals addressed this part

14 of -- of the case under its Roman III -- Roman III, I

15 think, the Contract Disputes Act. Did the Contract

16 Disputes Act issue -- question have anything to do with

17 the other argument about whether or not these concessions

18 are renewed? In other words, if a -- if it's not a --

19 these are just freestanding --

20 MR. GELLER: Yes.

21 QUESTION: -- issues unrelated.

22 MR. GELLER: Yes, yes.

23 QUESTION: All right. Thank you.

24 MR. GELLER: Yes, they are.

25 QUESTION: Mr. Geller, one other thing that I'm

1     curious about. Why does it matter? Why do you care --

2             MR. GELLER: It --

3             QUESTION: -- whether it's covered by the CDA?

4             MR. GELLER: Because the --

5             QUESTION: What's at stake here --

6             MR. GELLER: That's important --

7             QUESTION: -- in the real world?

8             MR. GELLER: That's a very important question,

9     Justice O'Connor. What is at stake are the rights --

10    the -- the rights, the substantive and the procedural

11    rights, that are available to -- to a Government

12    contractor if it -- it gets into a dispute with the --

13    with the contracting agency.

14             Now, under the CDA, there are very important

15    procedural and substantive rights that are available that

16    would not be available under other law, and that's -- that

17    was --

18             QUESTION: Well, like what? I mean, what --

19             MR. GELLER: For example --

20             QUESTION: -- what's at stake?

21             MR. GELLER: What's at stake principally is,

22    first of all, an administrative mechanism, which is these

23    boards of contract appeals, that would -- are available to

24    decide these matters expeditiously and particularly with

25    small claims without having to go to court.

1 QUESTION: As opposed to what?

2 MR. GELLER: As opposed to having to go to  
3 court, as opposed to having to go to the Court of Federal  
4 Claims where it's not even clear what the standard of  
5 review would be. The standard of review under the CDA is  
6 de novo. So that's a very important substantive and  
7 procedural right, in addition to --

8 QUESTION: De novo for who? For the contract  
9 board or for the court if you go --

10 MR. GELLER: Both. After the contracting  
11 officer decides an issue adversely to the contractor under  
12 the CDA, the contractor has the choice either to go to the  
13 Board of Contract Appeals or to file a lawsuit in the  
14 Court of Federal Claims. In either event, the review is  
15 de novo.

16 QUESTION: And if he chooses the contract board,  
17 then the -- the next step, the court step will be --

18 MR. GELLER: In the Federal Circuit.

19 QUESTION: Directly to the circuit.

20 MR. GELLER: Right.

21 QUESTION: You wouldn't go to the --

22 MR. GELLER: Right.

23 QUESTION: And that wouldn't be de novo, I take  
24 it.

25 MR. GELLER: No, it wouldn't be de novo. That

1 would be appellate.

2 QUESTION: But the main thing, as I understood  
3 it, was that you're trying to get out of the agency  
4 appeals. You don't want to have to go through the agency.  
5 This gets you right into court after the --

6 MR. GELLER: No.

7 QUESTION: -- contracting officer. Am I right  
8 about that?

9 MR. GELLER: No, and it's not right, Justice  
10 Breyer. Actually what we want to be able to do is to  
11 avoid having to follow whatever procedures the agency sets  
12 up in its contract for -- for seeking review if there's a  
13 dispute. We want to go --

14 QUESTION: But why can't you do that? That's  
15 what you've been doing all along. That's why you -- you  
16 have the several decisions of the IBCA. Every time you go  
17 to the IBCA, they say, yes.

18 MR. GELLER: Yes, but the Interior Department  
19 and the NPS has not acceded to those decisions, and it has  
20 issued a regulation that is --

21 QUESTION: But then isn't -- isn't the  
22 appropriate thing to go? You go to the IBCA. If the  
23 Government wants to challenge the jurisdiction that they  
24 will exercise, the resolution that they make, then it's up  
25 to the Government. But you can go to the IBCA. They have

1     been welcoming you.

2                   MR. GELLER:   Well, those were all prior to the  
3     Government's issuance of the regulation in this case, a  
4     regulation that's now been upheld by the D.C. Circuit.

5                   QUESTION:   Well, but you -- you say the  
6     Government's issuance of a --

7                   MR. GELLER:   The NPS.

8                   QUESTION:   It's the National Park Service.

9                   MR. GELLER:   Yes, yes.   Well, that's what we're  
10    dealing with here.

11                  QUESTION:   There's some dispute as to whether  
12    they even have the authority to issue it.

13                  MR. GELLER:   They don't, in fact, administer the  
14    CDA, Your Honor, so we don't think this is a regulation  
15    that's entitled to any deference.   Nonetheless, it's their  
16    position.

17                  QUESTION:   They -- they seem to agree with you  
18    on this point.   I mean, they've -- they've agreed in their  
19    terms that it's not a legislative regulation in that --

20                  MR. GELLER:   Right.

21                  QUESTION:   -- footnote 5 or 6 --

22                  MR. GELLER:   Right.

23                  QUESTION:   -- whatever it is.   What does that do  
24    to -- to our jurisdiction?   I mean, is -- is -- are -- are  
25    you now both --

1                   MR. GELLER: I don't think --

2                   QUESTION: -- in effect, claiming that this

3                   so-called regulation is nothing but the Government's

4                   statement of the intention to take a position when and

5                   if --

6                   MR. GELLER: Well, the --

7                   QUESTION: -- the time comes?

8                   MR. GELLER: Our view is that this is a

9                   regulation that represents the views of the NPS. It's not

10                  entitled to any deference because it's not a statute that

11                  they administer. The Government would have to give you

12                  its view of how much deference it is entitled to.

13                  QUESTION: Well, how do you read the --

14                  MR. GELLER: But this is still an APA --

15                  QUESTION: How do you read their concession in

16                  the footnote? Because apparently --

17                  MR. GELLER: I find that --

18                  QUESTION: -- I -- I take it that is new, by the

19                  way.

20                  MR. GELLER: I find that --

21                  QUESTION: Am I correct?

22                  MR. GELLER: -- footnote very confusing.

23                  QUESTION: So you -- you're recalling

24                  challenging not the -- not the ineffective regulation, but

25                  rather the inclusion of what the regulation says --

1 MR. GELLER: We're challenging both.

2 QUESTION: -- in the contracts. Is that --

3 MR. GELLER: We're challenging both. We brought  
4 an APA challenge to the regulation, as well as a Tucker  
5 Act challenge and a pre-bid solicitation challenge to the  
6 inclusion of these -- this -- this illegal term in the --  
7 in the contracts.

8 QUESTION: But isn't it the case that unless you  
9 have an -- an APA issue, there's nothing else that you can  
10 litigate at this point? I mean, if the only thing that  
11 you have to complain about is that they want to put a term  
12 in a contract that you think they shouldn't be putting in,  
13 it's up to you to decide whether you want to contract it  
14 on those terms or not.

15 MR. GELLER: No, because I think under the law  
16 we're entitled to challenge that solicitation as illegal.  
17 If we have to bid on these contracts, we're entitled to  
18 know --

19 QUESTION: No, but at this stage of the game,  
20 they're not claiming that their regulation is -- is what  
21 they call a legislative regulation.

22 MR. GELLER: They are claiming that that is the  
23 position that they're going to take and that it is  
24 entitled to some level of deference.

25 QUESTION: Well --

1           MR. GELLER: That footnote clearly says that it  
2 is entitled to some level of deference.

3           QUESTION: And --

4           MR. GELLER: This is clearly the position, and  
5 it's been upheld by the D.C. Circuit. There's no reason  
6 to suggest they're not going to adamantly enforce their --  
7 their views.

8           QUESTION: But then -- but if the case isn't  
9 ripe and we should so hold, I assume the appropriate thing  
10 to do would be to vacate the D.C. Circuit's decision to  
11 that extent.

12          MR. GELLER: Yes.

13          QUESTION: So then you'll be -- what you would  
14 be -- have is the Government has told you in advance what  
15 its litigating position would be and it has no more  
16 meaning than a -- a statement of what the Government's --

17          MR. GELLER: But it is --

18          QUESTION: -- position is with no -- no --

19          MR. GELLER: But, Justice Ginsburg, as I said,  
20 there's still this provision in all of the contracts.

21          QUESTION: The Government would still be asking  
22 you to enter a contract --

23          MR. GELLER: The Government would still be  
24 asking us to accede to a position and sign a contract that  
25 contains a term which we believe is illegal that says we

1 have no rights under the CDA.

2 QUESTION: Well, what -- what if the Government  
3 contract had a term that simply said, you know, there  
4 would be damages for delay, double damages depending on  
5 the amount of delay? And you say, well, I -- we don't  
6 think the Government is authorized to put that in a  
7 contract. Could you challenge that?

8 MR. GELLER: Yes. I believe so, Mr. Chief  
9 Justice. There is a very large body of Government  
10 contracting law -- it's not in the briefs because it  
11 wasn't raised -- allowing --

12 QUESTION: Well, is it --

13 MR. GELLER: -- allowing these sorts of  
14 challenges to illegal terms in contracts.

15 QUESTION: But where is the law? I mean, is it  
16 in the cases of this Court?

17 MR. GELLER: Well, obviously, these -- these  
18 cases are generally litigated in the -- in the Court of  
19 Federal Claims and in the district courts.

20 QUESTION: Is -- is that where the law is, in  
21 the Court of Federal Claims?

22 MR. GELLER: Yes. Well, there are probably some  
23 appellate decisions as well, but the law is fairly  
24 well-settled in this area. As I say, the Government has  
25 never challenged the ripeness of the CDA --

1                   QUESTION: Mr. Geller, you say -- you say it's  
2 settled, and please correct me if I'm wrong if -- if  
3 Abbott Laboratories has been overtaken. But my notion was  
4 that in order to have a pre-enforcement challenge, you had  
5 to have a pretty strong claim that you are hurting now, as  
6 they were, if they didn't -- if they spent all that money.

7                   MR. GELLER: Yes. Abbott Laboratories is -- is  
8 obviously an APA case. I think we could meet that  
9 standard because we need to know now whether we should bid  
10 on these contracts.

11                   But there's a separate body of law involving  
12 solicitations for Government contracts is what I'm saying  
13 to the Court.

14                   QUESTION: And does that get you --

15                   QUESTION: That -- that's your stronger card I  
16 think.

17                   MR. GELLER: Yes.

18                   QUESTION: And does that give you an APA cause  
19 of action?

20                   MR. GELLER: Well, we brought both an APA cause  
21 of action and a challenge under the -- under the Tucker  
22 Act, and you know, we would maintain that we can challenge  
23 this regulation, and in addition, we can challenge this  
24 bid solicitation. The two really overlap because the  
25 regulation is incorporated into the contract.

1           QUESTION: Was there any finding in the district  
2 court that the inclusion of this provision was critical as  
3 whether or not you'd go ahead with the contract?

4           MR. GELLER: There was no such --

5           QUESTION: I mean, I --

6           MR. GELLER: There -- there was no such --

7           QUESTION: -- I find it a little hard -- if it's  
8 a -- if it's a really good contract, you I suppose intend  
9 to comply with it and you don't think there's going to be  
10 any litigation at all.

11          MR. GELLER: Well, Your -- there was -- there  
12 was no finding by the district court, Your Honor, because  
13 there was not -- there was no challenge to the ripeness by  
14 the Government, but the -- the complaint, as I recall, did  
15 make that allegation. The complaint made the allegation  
16 that the contractors needed to know whether these  
17 contracts were covered by the CDA.

18          QUESTION: When you say these --

19          QUESTION: Well, could it make the further  
20 allegation that if it -- if it were not -- that if it  
21 were -- were not covered, it would not engage in the  
22 negotiations at all?

23          MR. GELLER: I don't specifically recall that  
24 allegation.

25          QUESTION: It's a commercial matter. It's hard

1 for me to see it if there's an advantageous contract, but  
2 you're not going to execute it --

3 MR. GELLER: Well, but it's a question of how --

4 QUESTION: -- if you go through one form of  
5 remedy or the other in the event of a breach.

6 MR. GELLER: But it's not binary, Justice  
7 Kennedy. Maybe you would still enter into the contract  
8 negotiations. It's one factor in deciding how much you'll  
9 bid on the contract.

10 QUESTION: Mr. Geller, you -- when you say these  
11 contracts --

12 MR. GELLER: Yes.

13 QUESTION: -- you keep referring to these  
14 contracts. They're -- actually you're talking about three  
15 contract forms. You're -- you're not discussing any  
16 particular --

17 MR. GELLER: Well, there are --

18 QUESTION: -- bid solicitation. You -- you have  
19 no particular bid solicitation, do you?

20 MR. GELLER: Well, no. Well, that's not  
21 precisely true, Justice Scalia, because there were bid  
22 solicitations. In the district court, there were -- there  
23 were lawsuits brought both by the National Park  
24 Hospitality Association on behalf of its members, as well  
25 as -- as lawsuits brought by several concessioners

1 challenging specific bid solicitations as to them. And --  
2 and therefore, there was both facial and as-applied, in  
3 effect, challenges to the -- to the CDA point in the -- in  
4 the --

5 QUESTION: What they say then is the  
6 Government -- as far as I understand it, the basic point  
7 is that this is not a procurement contract regardless of  
8 who's entitled to what deference. And the reason that it  
9 isn't is because we are not buying anything, and that  
10 isn't a technical point. That is an important point  
11 because you and us -- you, the private, and we, the  
12 Government -- are both in the business of selling things  
13 to the Government. We need somewhat more control over the  
14 interpretation of these contracts. And that's why the  
15 number of procedures you have to go through in the parks  
16 department is greater, and all the things that you don't  
17 like about it are things we do like about it. Namely, we  
18 get a little bit added control. But that's why  
19 legitimately these are not procurement contracts.

20 Now, your point in response to roughly that,  
21 or --

22 MR. GELLER: Well --

23 QUESTION: I'm just trying to get you to the  
24 merits, so I thought I'd --

25 MR. GELLER: Yes. I'd like to turn to the

1 merits. Thank you, Justice Breyer.

2 Can I -- I'd like to begin by saying it's purely  
3 a matter of statutory construction, and we think that the  
4 statute on its face unambiguously answers the question  
5 before the Court. And I think it would be helpful if the  
6 Court could look at section 3(a) of the Contract Disputes  
7 Act which -- which appears in many places, including  
8 page 1 of the blue brief, because you'll see that section  
9 3(a) states that unless specifically excluded therein, the  
10 CDA applies to, quote, any express or implied contract  
11 entered into by an executive agency for, among other  
12 things, the procurement of services or the procurement of  
13 construction, repair, or maintenance of real property.

14 QUESTION: The reason that doesn't help you is  
15 because --

16 MR. GELLER: The --

17 QUESTION: -- the question is what's  
18 procurement.

19 MR. GELLER: Well, I'm not sure that that's  
20 necessarily the question, but let me address it this way,  
21 Your Honor.

22 The National Park Service does not contend that  
23 its concessions contracts are not contracts within the  
24 meaning of the CDA. It doesn't contend that it's not an  
25 executive agency. And the NPS doesn't contend that any

1 provision of the CDA or, for that matter, any other  
2 Federal statute specifically excludes these contracts from  
3 the -- from the CDA. And, Justice Breyer, the NPS really  
4 doesn't even take issue with the fact that these  
5 concessions contracts procure services and procure the  
6 construction, repair, and maintenance of real property.  
7 In other words, every single statutory requirement on the  
8 face of the statute would seem to be satisfied --

9 QUESTION: But I thought they did challenge that  
10 these are -- that it's procurement.

11 MR. GELLER: They do not challenge, Your Honor,  
12 that -- that these contracts procure services --

13 QUESTION: In the -- in the sense of procurement  
14 as used in Government contracting?

15 MR. GELLER: Well, I think that's the issue in  
16 the case. The Government claims --

17 QUESTION: That's -- that's the issue in the  
18 case.

19 MR. GELLER: The Government --

20 QUESTION: I tried to --

21 MR. GELLER: And I would like to turn to that  
22 now because the Government claims that these contracts are  
23 not within the protection of the CDA. And why? Its  
24 entire argument amounts to the following.

25 The Government says that the word procurement

1 and the phrase, procurement contract, we are told, have a  
2 universally understood and well-settled meaning. And they  
3 tell us that to qualify as a procurement contract, the  
4 Government says, an acquisition must be for the direct use  
5 and benefit of the Government and it must be paid for with  
6 what the Government calls Government funds.

7 Now, the first thing to be said, Justice Breyer,  
8 about the Government's argument is that it is a complete  
9 invention. It is a complete invention. No Federal  
10 statute defines the word procurement or the word,  
11 procurement contract, to include the two requirements that  
12 the Government tells us are essential. In fact, the  
13 Office of Federal Procurement Policy Act -- the Government  
14 cites lots and lots of --

15 QUESTION: Well, the word procurement has a  
16 natural meaning. If they -- if they have a concessionaire  
17 to come and sell balloons on the Fourth of July, they  
18 don't say they've procured some balloons. They say  
19 they've arranged for some balloons.

20 MR. GELLER: Well, you'd say arranged. You  
21 could say they procured having someone sell balloons at  
22 the Fourth of July.

23 The -- the Office of Federal Procurement Policy  
24 Act --

25 QUESTION: No, but that -- that -- that's not

1 the usual meaning of -- of procure, I should think.

2 MR. GELLER: But the -- but there is no statute  
3 that -- the Office of Federal Procurement Policy Act,  
4 which is a companion statute to the CDA, actually has a  
5 definition of the word procurement. You wouldn't know it  
6 from reading the Government's brief because in their -- it  
7 doesn't refer to that, but it contains a definition of the  
8 word procurement that does not contain either of the two  
9 requirements that the Government tells us are essential to  
10 a Government procurement.

11 No court has ever construed the word procurement  
12 to include the two requirements that the Government tells  
13 us are clearly established and well-settled by Federal  
14 procurement --

15 QUESTION: Mr. Geller --

16 QUESTION: What about acquiring --

17 QUESTION: -- I'm looking at page 19 of the  
18 Government's brief, and they -- they define procurement.  
19 They're taking it from the -- the Federal acquisition  
20 regulations to say acquiring by contract with appropriated  
21 funds supplies or services by and for the use of the  
22 Federal Government. So --

23 MR. GELLER: Yes. That's -- that's not a  
24 statute, but let me address that, Justice Ginsburg.

25 First of all, appropriated funds. It is

1 clear -- and the Government has not challenged the fact --  
2 that the CDA applies to contracts even when appropriated  
3 funds are not used. That's clear on the face of the CDA.  
4 So the Government is forced to come -- come up with this  
5 new phrase, Government funds, which has, as far as we can  
6 tell, no basis at all in any prior statute or any Federal  
7 procurement law. And the fact --

8 QUESTION: It does have a basis in just what  
9 Justice Ginsburg was quoting, 48 C.F.R. 2.101. So they  
10 say it's not without foundation in the law. What -- what  
11 that's from is, I take it, it's a memo that -- or a policy  
12 issued jointly by the Secretary of Defense, the  
13 Administrator of General Services, and the NPS  
14 Administrator. So when they have a reg like that, I'd --  
15 I'd think that it's not so that it isn't somewhere in  
16 Federal law. It's right there.

17 Now, there are some other things there --

18 MR. GELLER: But --

19 QUESTION: -- that you say are not necessarily  
20 part of procurement. But that fact that there are other  
21 things that overstate it doesn't mean this does.

22 MR. GELLER: But, Your Honor, there are many  
23 other -- the Government principally relies on other  
24 statutes that have the -- have certain provisions like the  
25 ones they would like to introduce into the CDA in them.

1 But I think it's quite significant that Congress didn't  
2 put these provisions in the CDA.

3 QUESTION: But what about -- he put one in -- in  
4 the CDA, 41 U.S.C., section 612(c). It's discussed at the  
5 bottom of page 18 and the top of page 19 of -- of the  
6 Government's brief. And what it says is that the monetary  
7 awards in favor of a contractor will be paid out of the  
8 judgment fund and in turn provides for the reimbursement  
9 to the judgment fund, quote, by the agency whose  
10 appropriations were used for the contract, which would  
11 suggest that in all cases --

12 MR. GELLER: I don't think it -- it does not --

13 QUESTION: -- where there's been a judgment --

14 MR. GELLER: It doesn't suggest that at all,  
15 Justice Scalia. First of all, they only quote that  
16 incompletely. It also --

17 QUESTION: Yes, well, tell me why. I -- I know  
18 that your --

19 MR. GELLER: In -- in our --

20 QUESTION: -- reply brief -- I don't see how  
21 the -- the --

22 MR. GELLER: In our reply brief, it says, by  
23 such appropriated -- by -- by the appropriations of that  
24 agency or such other appropriations as the agency has to  
25 get.

1                   Now, the NPS is a -- a --

2                   QUESTION: But -- but it clearly envisions  
3 appropriations, whether they have it already or they have  
4 to get it later.

5                   MR. GELLER: But the -- the CDA on its face --  
6 and the Government concedes this -- applies to contracts  
7 that don't involve appropriated funds agencies.

8                   QUESTION: Well, we'll ask the Government about  
9 that. That's a -- that's a much more serious point.

10                  MR. GELLER: Yes. I think it's clear there's  
11 no -- there's no doubt that the CDA applies to any  
12 contract whether or not it's an appropriated funds agency  
13 or not.

14                  Let me just say that in addition to being, I  
15 think, totally unsupported as a matter of law, the  
16 limitations that the NPS asks this Court to read into the  
17 CDA would be completely unworkable as a matter of  
18 practice. I think we've already talked about the  
19 Government funds point which is, I think, a phrase that  
20 they have dreamt up. It has no basis in law, unlike  
21 appropriated funds, which is not the case of the CDA.

22                  But I think it's also the case that this use or  
23 benefit to the Government notion is completely unworkable.  
24 If, for example, the NPS were to go out and procure water  
25 coolers for use in the Department of Interior building,

1 the NPS would concede that those would be within the  
2 Contract Disputes Act because they're -- they're for the  
3 use and benefit of the Government. If the Government were  
4 to go out and procure the same water coolers for use on  
5 the Mall during the Fourth of July, the Court -- the NPS  
6 would say, well, that's not for the use or benefit of the  
7 Government. I don't know how you could decide what is for  
8 the use or benefit of the Government.

9           When -- if the Government -- if the NPS issues a  
10 contract to build a -- the World War II Memorial on the  
11 Mall, which is now being -- is now happening, is that for  
12 the use of the public or it is used for the Government?  
13 We don't think this is a defensible position, and it  
14 certainly finds no basis in the CDA. We think it's an  
15 irrational reading of the act that has no support in the  
16 language or the legislative history or the purpose of the  
17 statute.

18           And I want to say that even if there was a use  
19 or benefit to the Government limitation in the CDA, we  
20 think it would -- these contracts would still clearly  
21 satisfy it because these concessions contracts are being  
22 let in part to help the Department of Interior, the NPS  
23 fulfill its statutory mission. If these concessions were  
24 not there operating these restaurants or guest facilities,  
25 the NPS would have to operate them themselves in order to

1 satisfy its -- the statutory requirement that they provide  
2 for the use and enjoyment of the national parks. So we  
3 don't think it's possible to say that these concession  
4 contracts the -- that the NPS is completely indifferent to  
5 these concession contracts. They are clearly for the use  
6 and benefit not only of the public, but also of the NPS.

7 If the Court has no further questions, I'd like  
8 to reserve the balance of my time.

9 QUESTION: Very well, Mr. Geller.

10 Mr. Elwood, we'll hear from you.

11 ORAL ARGUMENT OF JOHN P. ELWOOD

12 ON BEHALF OF THE RESPONDENT

13 MR. ELWOOD: Thank you, Mr. Chief Justice, and  
14 may it please the Court:

15 QUESTION: Will you tell us why the Government  
16 doesn't want the CDA applicable here? I mean, what's --  
17 what's at stake for the Government in not applying it?

18 MR. ELWOOD: Justice -- Justice O'Connor, the  
19 reason why the Government doesn't want this applicable  
20 here is that the Contract Dispute Act was passed to  
21 address specific shortcomings in the remedial scheme that  
22 was available for procurement contracts, and because it  
23 was designed specifically for those purposes, it have --  
24 has terms that we don't think are appropriate in this  
25 context. For example --

1                   QUESTION: But that just doesn't tell me, as a  
2 practical matter, why the Government doesn't want it  
3 applicable here.

4                   MR. ELWOOD: For example, the prejudgment  
5 interest remedy. Congress --

6                   QUESTION: You don't want to pay prejudgment  
7 interest.

8                   MR. ELWOOD: Right, and we don't think it's  
9 appropriate. Congress provided prejudgment interest in  
10 the procurement context because procurement contractors  
11 would be required to perform under the contract even  
12 during the pendency of a dispute when they weren't being  
13 paid. And it was because of that unique position where  
14 they were both being required to make outlays without  
15 getting any income that Congress thought that because  
16 there was a --

17                  QUESTION: Okay. So at bottom, that's it, the  
18 prejudgment interest feature.

19                  MR. ELWOOD: I -- I think that and because --  
20 there are other things as well. For example, the purpose  
21 of the -- one of the purposes of the CDA was to cut  
22 through all of these requirements that you exhaust  
23 administrative remedies, but those simply aren't present  
24 in the concessions context. Traditionally concessioners  
25 had a direct right of access to courts, and Congress has

1 never indicated that they thought the remedial scheme was  
2 inadequate for concessioners. And --

3 QUESTION: Is this -- is this claim ripe? And  
4 why didn't you ever talk about it below? What's going on?  
5 It's -- it comes in such an odd posture. What is the  
6 Government's view on that?

7 MR. ELWOOD: The reason why we did not raise  
8 this -- why we did not raise this is because we did not  
9 raise it below. And as you can tell from the pleadings --

10 QUESTION: Why not?

11 MR. ELWOOD: -- is -- because the CDA was kind  
12 of a side show below. It was a relatively small issue and  
13 it was just not the focus of the proceedings, as you can  
14 tell by the opinion.

15 But I think that the Court has raised valid  
16 concerns about the ripeness in this sense. The Court has  
17 traditionally said in a pre-enforcement challenge to a  
18 regulation that a claim is ripe if it affects primary  
19 conduct so that -- so that if they don't comply, they  
20 might be held liable. That's the Abbott Labs line of  
21 cases.

22 And here this doesn't affect primary conduct.  
23 It -- it predominantly just says whether or not -- which  
24 forum you're going to have a remedy in.

25 QUESTION: Well, I -- I would agree --

1           QUESTION: What about this -- what about the --  
2 the reply? I came in thinking ripeness was a problem, and  
3 your brother on the other side gave to me what was a very  
4 convincing answer. What's wrong with that answer?

5           MR. ELWOOD: And that is -- the thing is because  
6 it predominantly just determines which forum you have --  
7 which forum you bring your claim in, I don't know --

8           QUESTION: I know it doesn't affect -- but what  
9 they're saying is that where the Government offers general  
10 contracts to the industry and there is a term in all of  
11 those contracts which, in the view of the industry, is  
12 unlawful, they -- it's ripe for them to challenge that.  
13 Now, what I'm afraid here would be that we or you or  
14 somebody, in deciding whether that's an incorrect  
15 argument, would upset what could be -- I have no idea if  
16 it is -- a practice of contractors objecting to terms in  
17 offered contracts as contrary to law.

18           So are you saying now that that is not ripe?  
19 Are you saying that a contractor who comes into a court  
20 and objects to a term in a proposed contract as contrary  
21 to law does not have a claim because it is not ripe? Is  
22 that the Government's position?

23           MR. ELWOOD: No, I don't think that would be our  
24 position. If it affects their primary --

25           QUESTION: No. I would think probably you would

1 at least want to brief it.

2 MR. ELWOOD: Right.

3 I think that if it affects their primary  
4 conduct, if affects what their obligations would be under  
5 the contract, I think that that claim would be ripe for  
6 pre-enforcement review. But where it simply determines  
7 which forum they'll bring the claim in, I don't think it  
8 would be covered.

9 QUESTION: But they said it's the first that's  
10 at issue here. Now, is it not because -- you heard what  
11 he said. So --

12 MR. ELWOOD: That -- that's correct. But I  
13 think simply because it determines which forum you bring  
14 your claim in, I don't think it would be covered. If I  
15 were --

16 QUESTION: So you -- so there's a dispute  
17 between the two sides on what the case law says as to  
18 whether -- and it isn't even a general -- a general attack  
19 upon the form of -- upon a form contract. But as we  
20 understand from petitioners, there were particular bids  
21 outstanding that were challenged because -- because of a  
22 term in them that -- that was claimed to be unlawful. And  
23 it is your position that you cannot challenge a particular  
24 bid because of an unlawful term unless that unlawful term  
25 affects your primary conduct.

1                   MR. ELWOOD: No. If it affects something other,  
2 I think, than the forum in which it was brought, I mean,  
3 if it affects what you think your obligations will be,  
4 if -- if it affects the price that you think you should  
5 pay or that you should bid on a contract, I think that  
6 that would be --

7                   QUESTION: Well, it -- it does on your analysis.

8                   MR. ELWOOD: -- subject to pre-enforcement  
9 review.

10                  QUESTION: Doesn't it? I mean, you said one of  
11 the things that is important is prejudgment interest. So  
12 I -- I suppose their liability under the contract is going  
13 to be affected by -- by the correctness of the reg.

14                  MR. ELWOOD: I don't think their liability --

15                  QUESTION: Their primary conduct won't be, but  
16 their potential liability, if there is a contract dispute,  
17 would be.

18                  MR. ELWOOD: Your Honor, I confess that I am not  
19 sure if the Government gets prejudgment interest under the  
20 CDA or not. But if it were -- if -- if it simply ran to  
21 the contractors, I think that -- that the prospective  
22 interest on a claim that has not even arisen yet seems a  
23 little vague --

24                  QUESTION: Why is that vague? I mean, they --  
25 they have to make a bid. They have accountants. These

1 are big companies. They calculate everything down to the  
2 finest penny, and -- and they say, you know, we take into  
3 account whether we're going to get prejudgment interest,  
4 which we -- if we have a dispute. And by the way, we have  
5 one dispute every 3 hours, and so it's a lot of money to  
6 us. And we will bid \$42.36 less if we're not getting  
7 the -- whatever. All right? So they work it all out.  
8 They have accountants who do it.

9 And so, if that's so -- of course, if it isn't  
10 so, it's a different story. But they've said something  
11 like that's so.

12 MR. ELWOOD: I think it -- it would turn on --  
13 in that case I just don't think that in advance you can  
14 say with enough sort of concreteness and specificity that  
15 you know how much a particular claim -- the -- the as-yet  
16 unfiled, unrealized contract claims would be worth. You  
17 could say --

18 QUESTION: But, Mr. Elwood, isn't it really --  
19 isn't a waiver of prejudgment interest comparable to a  
20 waiver of punitive damages, for example, which if you  
21 insist on it, would affect the -- the amount one would bid  
22 for a contract? I don't understand why you say it's worth  
23 nothing.

24 MR. ELWOOD: I mean --

25 QUESTION: I mean, it's something -- if the

1 Government is willing to fight about it here and insist --  
2 and put it in every contract, it must be of value to the  
3 Government.

4 MR. ELWOOD: What is actually -- just if I could  
5 clarify this. What is put into the contract is just a  
6 general term that applicable law will apply and because  
7 applicable law includes all regulations, it is  
8 incorporated that way. It doesn't specifically include a  
9 CDA waiver or anything of that sort.

10 QUESTION: So the contract itself does not  
11 specify that the CDA does not apply.

12 MR. ELWOOD: No. It just says applicable law  
13 governs the contract.

14 But I think it's just a matter --

15 QUESTION: And is it -- is it your view, since  
16 you said your -- your interpretation now of the -- the  
17 position that the Park Service is taking that it -- it  
18 doesn't constitute law? How can it constitute law? First  
19 of all, the Contract Dispute Act is not within the Park  
20 Service bailiwick. It isn't -- as you concede, it isn't  
21 the -- doesn't administer this act. So does that  
22 regulation constitute any kind of law?

23 MR. ELWOOD: I think that that's a valid concern  
24 because our position is that this is basically just an  
25 interpretive rule announcing the position that the Park

1 Service will take and the Park -- and the position that  
2 the Park Service employees will take in administering it.

3 QUESTION: So you're saying -- you -- you claim  
4 that this provision is not incorporated in the contracts.  
5 Is that the position the Government is taking?

6 MR. ELWOOD: I think -- honestly, Justice  
7 Scalia, I think it's just -- it's a -- it's a new  
8 proposition for me, and I think that a good argument could  
9 be made that it is not included because it -- it really  
10 just represents the position of the National Park Service.

11 QUESTION: Even leaving aside the question of  
12 inclusion, what is -- what do you understand your  
13 difference to be from the petitioners with respect to the  
14 status of the regulation itself? Is there any difference  
15 at all?

16 MR. ELWOOD: I don't know that there is a -- a  
17 difference with respect to the petitioner's view. It's an  
18 interpretive rule that the Park Service has --

19 QUESTION: Have we got any jurisdiction left?

20 MR. ELWOOD: I believe so because it is the  
21 announced position. It's not just a policy statement. It  
22 is basically a directive to the --

23 QUESTION: Yes, but what's the difference  
24 between a policy statement and an announced position?  
25 The -- the point at which each one is going to have

1 practical effect is the point at which there is a claimed  
2 breach and an argument, if there is one, over what the  
3 remedial process is.

4 MR. ELWOOD: Yes, but I think that the only  
5 difference would be the -- the principal difference would  
6 be policy statements are more -- involve more variance in  
7 that they say as a general policy we will do this, whereas  
8 the -- as an interpretive rule, it just says that we do  
9 not believe that concession contracts are procurement  
10 contracts.

11 QUESTION: What -- what is the position of the  
12 Government? Now, I know this is hitting you cold, but I  
13 think it would be helpful.

14 Position one. We have not thought of ripeness  
15 before, and the case has been argued and submitted on the  
16 assumption that, for example, the bidding would be  
17 affected by this term which is incorporated into the  
18 contract. That's been the assumption, and we see no  
19 reason to depart from it. It's not jurisdictional. So  
20 decide the issue we briefed. That's position one.

21 Position two. We haven't thought of ripeness  
22 before, but now that we think about it, we think it's  
23 quite a serious problem and we're not certain what the --  
24 what the -- what the issue is in ordinary contracts, and  
25 we're not certain whether it's incorporated. So we think

1     you should say that this case is not ripe.

2                 Now, do you take position one, which will mean  
3     we perhaps could go to decide the issue for which it was  
4     granted, or do you take position two, which means you see  
5     ripeness as a big problem here that we ought to look at  
6     further?

7                 MR. ELWOOD: Well, Justice Breyer, it's clearly  
8     been the position of the Court that it is not bound by the  
9     failure of the parties to raise it. That's in Reno versus  
10    Catholic Social Services, and of course, you can raise  
11    it --

12                QUESTION: I'm not asking you what the law is  
13    exactly. I'm asking you what's the Government's position.

14                MR. ELWOOD: I -- I think our position would  
15    be -- I mean, we -- we filed a brief in opposition and I  
16    think, you know, if -- if we can win on ripeness grounds,  
17    that's great too.

18                QUESTION: Well, you wouldn't necessarily --

19                (Laughter.)

20                QUESTION: You wouldn't necessarily win. I  
21    mean, I -- I don't know if you would win. I mean --

22                MR. ELWOOD: Right. We might lose the -- the  
23    judgment of the D.C. Circuit as well, but --

24                QUESTION: You -- you would have to. If it's  
25    not ripe, we'd have to vacate it to that extent. But

1     this -- in the D.C. Circuit --

2                 QUESTION: Put you back to square one. No --

3                 QUESTION: In the D.C. Circuit, this was a  
4     giant, one of those typical wholesale attacks on many,  
5     many regulations, on the whole -- on the whole rulemaking.  
6     Is that correct?

7                 MR. ELWOOD: That's correct, Your Honor.

8                 QUESTION: And this was just a tiny, tiny piece  
9     of a long, long opinion --

10                MR. ELWOOD: That's correct, Your Honor.

11                QUESTION: -- treating -- so maybe just nobody  
12     noticed.

13                QUESTION: It seems unfair to pick it apart in  
14     this way. Just a little part of a major opinion.

15                MR. ELWOOD: Well, I think that it -- it just  
16     points out the fact that, I mean, they -- they had an  
17     awful lot on their plate, and it perhaps eluded them for  
18     that reason.

19                QUESTION: Now, the as-applied/facial. Was the  
20     as-applied challenges -- did those center on this issue or  
21     did they relate to the -- to another issue?

22                MR. ELWOOD: They related to other claims,  
23     Justice Ginsburg. Xanterra has characterized their claim  
24     as an as-applied claim although they're -- they're not  
25     asking for as-applied review in this case. But if you

1 look at their -- their complaint, their complaint involved  
2 their intention to bid on an as-yet unreleased prospectus.  
3 And so, in that sense, I don't think that is an as-applied  
4 change for two -- for two reasons. Not only is there no  
5 contract dispute, but at the time that the complaint was  
6 filed, there was no contract. So we think that it would  
7 be a facial challenge.

8 QUESTION: Mr. Elwood, if I can assist you in  
9 giving the merits here, is it -- is it the case, as the  
10 petitioners contend, that the Government concedes that not  
11 all contracts covered by the CDA are contracts in which  
12 appropriated funds are used?

13 MR. ELWOOD: That's correct. To the extent that  
14 it covers nonappropriated fund instrumentalities, it  
15 covers contracts that would involve the expenditure of  
16 nonappropriated funds. Those are, however, Government  
17 funds, funds of Government entities known as  
18 nonappropriated fund instrumentalities.

19 QUESTION: Well, once you slip off from  
20 appropriated into -- into Government funds, you don't put  
21 any -- you don't have any statutory text you can appeal to  
22 as -- as separating out the CDA from -- from your Park  
23 Service concessions.

24 MR. ELWOOD: I -- I don't agree, Justice Scalia.  
25 Both the -- well, to begin with, just in terms of giving

1 an indication of what the commonly accepted meaning of the  
2 term was at the time, the Commission on Government  
3 Procurement Reform, which was the -- which was the impetus  
4 for all of these reforms, defined procurement as purchase  
5 of product or service for Federal use, which incorporates  
6 both a -- a notion of expenditure and Federal use. And  
7 both the -- the 1969 act --

8 QUESTION: Yes, but Federal use, of course -- it  
9 is of use to the Park Service to have facilities available  
10 to the public. So that doesn't really answer the  
11 question. The parks -- the Park Service wants parks  
12 available to the public with services in them, restrooms  
13 and buildings and restaurants and so forth. Doesn't it?  
14 So in a sense, it is for the use of the Park Service and  
15 the Government as well as for the public.

16 MR. ELWOOD: It is for the use -- well, it is  
17 not for the direct use of the National Park Service, and  
18 that is where the Federal grant and cooperative agreement  
19 comes in. 8 months before passage of the CDA, Congress  
20 explained its understanding of what different types of  
21 instruments would be used for, and it explained in that  
22 that a procurement contract would be an instrument whose  
23 principal purpose is the acquisition by purchase, lease,  
24 or barter of goods or services for the direct use and  
25 benefit of the Government. And --

1                   QUESTION: Well, it doesn't really say that.  
2   And the language in the CDA is broad, and presumably this  
3   was a -- an act that was presumed to have broad  
4   application.

5                   MR. ELWOOD: It was presumed to have broad  
6   application among procurement contracts. There's no  
7   indication that they did not intend the word procurement  
8   to have the ordinary meaning that it does in that sense,  
9   as indicated in the Commission on Government Procurement  
10   Reform and the way it was used there, as indicated in the  
11   1969 act creating the commission and the OFPP Act where  
12   the simple use -- word procurement was understood to  
13   mean --

14                  QUESTION: Was -- was there ever any amendment  
15   offered in Congress to make clear that it didn't apply to  
16   concession contracts?

17                  MR. ELWOOD: There was no -- no, there was no  
18   indication in the entire legislative history that the --  
19   that concessions came up, and in 1,200 pages of reports on  
20   both procurement and nonappropriated fund procurement,  
21   there was not a single mention of -- of -- national parks  
22   concessions.

23                  QUESTION: And how long -- at -- at any point  
24   did the CDA -- was it applied or followed with any  
25   concession contracts, or is this something that has arisen

1 recently? Was it used at one point?

2 MR. ELWOOD: There are a number of Armed Service  
3 Board of Contract Appeals that assume CDA jurisdiction,  
4 and the Board of Contract Appeals of the Department of  
5 Interior started using it in 1989. But I'm not familiar  
6 with usage prior to that --

7 QUESTION: These are for what concessions?  
8 PS -- PX concessions, for example?

9 MR. ELWOOD: Yes, Justice Scalia.

10 QUESTION: Well, why isn't that -- I mean --  
11 because I was about to ask that question because I thought  
12 you're drawing the distinction between a concession to  
13 provide food and hot dogs and amusement to visitors to the  
14 park, which you say is not covered by the CDA, and it  
15 seems to me, a contract to provide food and hot dogs  
16 and -- I don't know -- maybe amusement -- I don't know  
17 what they have at PX's -- to members of the armed forces.  
18 Why isn't at least the latter, although it's a concession  
19 contract, why isn't that clearly for the benefit of the  
20 Government even -- even in the narrow sense in which you  
21 use that term?

22 MR. ELWOOD: No, Justice Scalia. We would -- we  
23 would agree that that is for the benefit of the  
24 Government. It's -- it doesn't involve the expenditure of  
25 Government funds, but it's for the benefit of the

1 Government. And for this reason --

2 QUESTION: So that would be covered by the CDA.

3 MR. ELWOOD: I -- I don't believe it necessarily  
4 would because it doesn't involve the expenditure of  
5 Government funds. It's still private contractors coming  
6 in and being -- and paying the Government for the  
7 opportunity to do that.

8 But as far as the benefit goes, I think agencies  
9 have a direct interest in providing benefits to their  
10 employees and especially in the PX example because PX's,  
11 for example, are basically a fringe benefit for servicemen  
12 and women and their dependents in that it's -- it's --  
13 basically access is limited to them. And salary and  
14 fringe benefits of that sort are how agencies procure  
15 employees. That is how they attract and retain qualified  
16 personnel. And in fact, agencies have drawn a distinction  
17 between benefits provided to employees and benefits  
18 provided to the entire public --

19 QUESTION: But isn't that the --

20 QUESTION: You'd say -- it still isn't covered,  
21 you say, unless the Government pays out cash. Is that  
22 right?

23 MR. ELWOOD: I think that that would be the  
24 better view, but I think obviously a stronger argument  
25 could be made for concessioners.

1           QUESTION: Well, why did you say it was not in  
2     the legislative history in that respect? What -- what is  
3     this? You -- you quote in your brief -- I just want a  
4     little clarification. There's a committee report. The  
5     Senate report says that, quote, concessions contracts do  
6     not constitute contracts for the procurement of goods and  
7     services for the benefit of the Government or otherwise.  
8     And -- and there's something odd about that statement, but  
9     I got it out of -- you quoted it. And that seems to be  
10    the legislative history of the act, and apparently it  
11    isn't. Where -- what's -- what's the status of that  
12    particular remark?

13           MR. ELWOOD: No. Those are both the -- those  
14    are committee reports --

15           QUESTION: Yes.

16           MR. ELWOOD: -- for the 1998 act. So it's part  
17    of the legislative history.

18           QUESTION: So why isn't that legislative  
19    history?

20           MR. ELWOOD: Oh, it is -- it is -- I don't  
21    know that I understand your question.

22           QUESTION: It says concessions contracts are not  
23    contracts for procurement of goods and services.

24           MR. ELWOOD: Oh. I was addressing the -- the  
25    legislative history of the CDA, not the 1998 act.

1           QUESTION: Well, is -- aren't we -- oh, the 1998  
2 act is which? That's the --

3           MR. ELWOOD: That is the act -- the current  
4 concession authority, the current authority under which  
5 the National Park Service issues concession contracts.

6           QUESTION: So what we have is in that act --

7           QUESTION: That was an act that said they're --

8           QUESTION: Yes, I see. I see.

9           QUESTION: -- they're not continuously renewed  
10 with the same --

11          MR. ELWOOD: That's correct. It eliminated  
12 the --

13          QUESTION: -- provider. It was the act that  
14 said, but we're going to terminate these things.

15          MR. ELWOOD: That's correct.`

16          QUESTION: When did the Park Service first  
17 install this -- when did it first take this position? It  
18 wasn't just under the regulations, as I understand it.  
19 When did the Park Service take the position that  
20 concession contracts were not procurement contracts?

21          MR. ELWOOD: The first time they took that  
22 position publicly was in 1979 in a Board of Contract  
23 Appeals case, Yosemite Park & Curry Company. The court --  
24 the IBCA, rather, did not address it, though, because it  
25 was actually before the effective date of the CDA, and

1 they took it specifically with respect to the CDA there.  
2 But traditionally -- although it's impossible because of  
3 absence of institutional memory, traditionally concession  
4 contracts have not been viewed as procurement contracts by  
5 the National Park Service.

6 QUESTION: But they --

7 QUESTION: You indicated that there's a stronger  
8 argument in some instances than in others for the fact  
9 that it's a concession. A concession contract can be a  
10 procurement contract. Does that go back to our basic  
11 question about ripeness and we don't know what we're  
12 involved with here? Or can we take these contracts where,  
13 I take it, they did involve the construction of facilities  
14 at national parks, et cetera, which does benefit the  
15 Government in the long term?

16 MR. ELWOOD: Well, to the extent that the Court  
17 thinks that the specific terms of concession contracts and  
18 what is accomplished under them affects the determination  
19 of whether or not they're procurements, I think that the  
20 Court would have some difficulty in saying authoritatively  
21 whether they all are or an unacceptably high portion of  
22 them are procurement contracts without having a better  
23 idea of what is included with them.

24 If I could --

25 QUESTION: But if -- on a case-by-case basis,

1 then that would indicate the regulation is deficient  
2 because the regulation doesn't purport to -- to use  
3 this -- this kind of fine distinction.

4 MR. ELWOOD: But still it -- it's something that  
5 could be addressed in as-applied challenges where you  
6 could say, in my particular case, where it requires me to  
7 build a lodge or whatever, this is a procurement contract,  
8 and under those circumstances it would be very clear  
9 exactly what was required of the procurement contractor.  
10 And they could -- they could -- of the concessions  
11 contractor and they could determine whether or not that  
12 particular contract was a procurement.

13 QUESTION: The regulation -- the regulation  
14 would then be invalid to that extent.

15 MR. ELWOOD: Yes, but the Court has held -- this  
16 Court has indicated in INS versus National Center for  
17 Immigrants' Rights, Babbitt versus Sweet Home, and cases  
18 like that that -- that merely because a regulation is  
19 invalid in some applications, it will not be invalidated  
20 on a facial basis.

21 If I could just address specifically --

22 QUESTION: Mr. Elwood, is there anyplace we  
23 could look to see how much prejudgment interest the Park  
24 Service has had to pay each year? Is it a big-ticket  
25 item?

1                   MR. ELWOOD: It's not a big-ticket item. The  
2 only three cases in which the -- the CDA has been applied  
3 to national park concessions are the three IBCA cases  
4 mentioned, and in two of those, the Government wound up  
5 winning on the merits, so there was no prejudgment  
6 interest paid. So it's only in that R&R Enterprises case  
7 that the Government would have paid any prejudgment  
8 interest in this case.

9                   If I could just go to your example, Justice  
10 Kennedy, about the building of buildings on national  
11 parklands. I believe that is not a procurement for -- for  
12 a variety of reasons. First, just as a statistical  
13 matter, 78 percent of concessions contracts do not involve  
14 any capital improvements. And that is a very broad term.  
15 It's much broader than just structures. It's structures,  
16 unremovable property, and fixtures.

17                  But on the merits, many concessions contractors  
18 have been required, since the very beginning of the --  
19 of -- of concessions, 1872, to require -- they've been  
20 required to build their own buildings. And historically  
21 that has not been considered something that the Government  
22 gets. It doesn't get the benefit of those services  
23 because it enters the contracts not for purposes of  
24 getting a building, but because it wishes to have  
25 concessioners provide services to park visitors. And in

1 order to do that, it tolerates the building. The National  
2 Park Service doesn't want buildings in the parks. It  
3 wants nature in the parks, and it tolerates the buildings  
4 to the extent that they are used to provide visitor  
5 services. And I think this comes across in the way these  
6 are treated by the contract.

7           Even though the Government has bare title in  
8 these buildings, in a very real sense it doesn't buy them.  
9 Every concessioner who builds a building in the national  
10 parks under a concessions agreement will have a leasehold  
11 surrender interest equal to the construction cost of the  
12 building plus inflation minus depreciation. And they  
13 cannot be put out of that building by anyone until they  
14 are paid that leasehold surrender interest; that is, until  
15 the building essentially is bought. As long as a  
16 concessioner is operating out of that building, a  
17 concessioner will hold the leasehold surrender interest,  
18 not the Government.

19           Also, I think it's telling that the form  
20 contract indicates that if the concessioner ever leaves  
21 the -- ever abandons the building, ever -- that they have  
22 constructed, that the Government can require them to knock  
23 it down and restore the site to its natural -- its natural  
24 state. That's section 9b of the standard contract and in  
25 the contract that it's in the joint appendix. So again,

1     that's an indication that they're not interested really in  
2     procuring the construction services. They're interested  
3     in authorizing a concessioner to provide services to  
4     visitors to the national parks.

5             Finally, I think it's noteworthy that Congress  
6     obviously knew that concessioners would be building  
7     buildings under the 1998 act, which was enacted against  
8     the backdrop of this regulation setting forth the Park  
9     Service's consistently held view that concessions  
10    contracts are not procurement contracts. And far from  
11    displacing that view, they actually seem to embrace it  
12    both in the text of the act and in the legislative history  
13    that Justice Breyer mentioned.

14            As far as the text of the act goes, I think it's  
15    telling that -- the different types of language they use  
16    for both the concessions side of the house and the  
17    procurement side of the house. On the concessions side,  
18    they use distinct language that I don't think you're going  
19    to find in any procurement statute anywhere. Instead of  
20    saying procure or purchase, they say they -- the -- the  
21    Park Service can authorize concessioners to provide  
22    services, and it even specifies that the services will not  
23    be provided to the Government. It says they're provided  
24    to visitors, which is obviously very different from  
25    procurement statutes, many of which specifically state

1     that the service will be provided to the agency.

2                 QUESTION:   Maybe the Park Service wrote that  
3     portion of the committee report.

4                 MR. ELWOOD:   No.   That -- Justice -- Justice  
5     Scalia, that's the actual text of the statute.

6                 QUESTION:   Okay.

7                 MR. ELWOOD:   And by contrast with that, the  
8     actual text of the procurement provisions of the 1998 --  
9     section 5959, used typical procurement language and  
10    specified that the Park Service will be benefitting from  
11    it.  It says that the -- that the service can enter into  
12    management consultant agreements whereby management  
13    consultants provide services to assist the Secretary in  
14    administering the program.  So it's a contrast both -- I  
15    think in both ways.

16                Finally, one other thing that I think is telling  
17    is that Congress specifically provided that some of the  
18    most likely to arise disputes under the act, including  
19    specifically franchise-free disputes, which I think people  
20    would think would -- would arise frequently, would be  
21    subject to mandatory arbitration.  And if Congress had  
22    thought there was an administrative remedy for this under  
23    the CDA, I just don't think there would be any need for  
24    them to provide for an -- a mandatory arbitral remedy.

25                QUESTION:   Mr. Elwood, is the petitioner right

1 in saying that -- that when the Government sell goods --  
2 sells goods, that comes under the CDA?

3 MR. ELWOOD: That is correct. Under 602(a)(4),  
4 the -- when the Government disposes of property that is  
5 not -- when the Government -- Government disposes of  
6 personal property, those sales are covered by the CDA.  
7 However, petitioner has never raised that theory in this  
8 Court -- in any court.

9 QUESTION: Those are not procurement contracts,  
10 are they?

11 MR. ELWOOD: No, but they -- they don't purport  
12 to be. If you look at the CDA, the word procurement is  
13 always used in the clause for procurement of services,  
14 procurement of construction, repair. And -- and that was  
15 tacked on at the end basically because GSA at the time  
16 subjected sales contracts to the same dispute clause, that  
17 was problematic, that procurement contracts were. But  
18 that still -- in order to get coverage under the CDA under  
19 petitioner's theory, they still must be a procurement  
20 contract or must involve the procurement of services.

21 If there are no further questions from the  
22 Court.

23 QUESTION: Thank you, Mr. Elwood.

24 Mr. Geller, you have 2 minutes remaining.

25 REBUTTAL ARGUMENT OF KENNETH S. GELLER

1                               ON BEHALF OF THE PETITIONER

2                               MR. GELLER:   Thank you, Mr. Chief Justice.

3                               The complaint -- the complaint in this case was  
4   filed under the authority of 28 U.S.C. 1491(b).  The Court  
5   will find that at page 13 of the joint appendix.  And  
6   that -- that statute provides for district court  
7   jurisdiction to adjudicate challenges to the terms of  
8   proposed Government contracts.  And I think if you look at  
9   paragraph 62 and 114 of the joint -- of the complaint,  
10  which is in the joint appendix, you'll see the allegations  
11  that were made in the complaint to fall within that  
12  provision of -- of title 28.

13                            As to the substance of the CDA claim, the  
14  Government makes much of the fact that no, quote,  
15  Government funds were used here.  And I cannot stress  
16  enough that that is a phrase that they've invented for the  
17  purposes of this case.  It makes much of the fact that the  
18  concessioners received monies here from the visitors to  
19  the national park, remit some of it to the NPS as a  
20  franchise fee, and keep the rest of it.  But these  
21  contracts could just have easily been structured so that  
22  the NPS got all the money in the first instance, kept some  
23  of it as a franchise fee, and paid the rest of it back to  
24  the concessioners.  And in fact, some Government  
25  concessions contracts are written that way.  In that case,

1 even the Government, I think, would have to concede that  
2 Government funds were used. We can't believe that the CDA  
3 coverage of the CDA, these important procedural and  
4 substantive protections, turns on such flimsy  
5 determinations as to who gets the money in the first  
6 instance.

7           Now, secondly, we -- we've already talked about  
8 the fact that so many services are being provided here  
9 that are for the use and benefit of the Government, as  
10 well as for the visitors of the national parks.

11           But I also want to point out that the Government  
12 is the sole beneficiary of the contractual provisions in  
13 virtually every concessions contract requiring the  
14 construction, repair, and maintenance of facilities in the  
15 national parks. You know, if the Court will look, for  
16 example, at page 96 of the joint appendix, which is a -- a  
17 provision of the Grand Canyon contract that's in the  
18 record, you'll see there that this contract -- under this  
19 the contract, the NPS is there procuring maintenance,  
20 repair, housekeeping, and groundskeeping for all  
21 concessions facilities. It seems to us if you look at the  
22 language of that -- of that procurement and compare it to  
23 section 3(a)(3) of the CDA, which -- which provides that  
24 CDA coverage for contracts for the procurement of  
25 construction or repair or maintenance of real property,

1     it's impossible to conclude, I think, that this  
2     procurement contract doesn't fall within the CDA.

3             Thank you.

4             CHIEF JUSTICE REHNQUIST:   Thank you, Mr. Geller.

5             The Court wishes supplemental briefs on the  
6     issue of ripeness, simultaneous briefs, due 3:00 p.m.  
7     Friday.

8             The case is submitted.

9             (Whereupon, at 11:18 a.m., the case in the  
10    above-entitled matter was submitted.)

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